Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ROSEANN DALEY EVANS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FRED DALEY, DECEASED,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, RECEIVER FOR UNIVERSITY SAVINGS ASSOCIATION, AND IN ALL OTHER CAPACITIES, AND TED KOHLEFFEL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by affirming the District Court's summary judgment for the Defendants because the District Court failed to follow the summary judgment standard of Rule 56(c).

PARTIES TO THE PROCEEDING

Roseann Daley Evans, Petitioner

University Savings Association, Respondent

Resolution Trust Corporation, as Receiver for University Savings Association, Respondent

Ted Kohleffel, Respondent

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No. _____

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ROSEANN DALEY EVANS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FRED DALEY, DECEASED,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, RECEIVER FOR UNIVERSITY SAVINGS ASSOCIATION, AND IN ALL OTHER CAPACITIES, AND TED KOHLEFFEL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Roseann Daley Evans, Individually and as Administratrix of the Estate of Fred Daley, Deceased ("Evans") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 16, 1994.

OPINION BELOW

The opinion of the Court of Appeals and the opinion of the District Court are both unreported. The opinions of the District Court and the Court of Appeals are both set forth in the Appendix to this Petition. Before being removed to Federal Court, Petitioner's case was also dismissed on Respondents' motions for summary judgment from state District Court and heard by a Texas Court of Appeals. The Texas Court of Appeals' opinion is also found in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 16, 1994, and thus, this Petition is being filed within ninety (90) days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES

Rule 56(c) of the Federal Rules of Civil Procedure states, in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

Fred G. Daley, Evans' half-uncle, died on February 29, 1984 after a two week stay in the hospital. Ted Kohleffel ("Kohleffel"), Daley's neighbor and friend, visited Daley often during Daley's hospital stay. A day or two after Daley's death, Kohleffel went to University Savings Association ("USA") and was permitted access to Daley's safety deposit box. Kohleffel did not have permission from anyone to open the safety deposit box and USA was expressly prohibited to allow anyone other than Daley, his heirs, administrator or successors into the safety deposit box according to its written agreement with Daley. Kohleffel admits that he entered Daley's box on two occasions and that he removed documents from it. To gain access, Kohleffel represented to the bank employee that he wanted to enter his own box but instead of his key, he gave the bank employee Daley's key. Kohleffel also represented to the bank employee that Daley was still living. As no record of its contents exists, only Kohleffel knows the contents of the box at the time of Daley's death. After removing the contents of the box, Kohleffel turned a few documents over to Evans, and a few, including Daley's birth certificate and Certificate of Honorable Discharge from the military, to the funeral home in charge of Daley's funeral arrangements.

Evans, an heir of Daley, did not have a copy of Daley's Will, nor did she know of its location; however, Kohleffel told her that Daley did have a Will. Yet, Evans was unable to locate the Will. Subsequently, Evans learned that Kohleffel removed papers not only from Daley's box but also from Daley's home. She also learned that he was attempting to have handwritten notes which

had been prepared by Daley and Kohleffel while Daley was hospitalized, admitted as a valid Will. Kohleffel's actions to have the handwritten notes considered a valid will were particularly suspect, because Kohleffel's wife, Dana, would be the primary beneficiary of the handwritten notes. The combination of Kohleffel's efforts to probate the handwritten notes and his unauthorized entry into Daley's home and the safety deposit box, led Evans to the reasonable belief that Daley may, in fact, have had a will after all and that this true will was removed from the safety deposit box by Kohleffel and destroyed or hidden away.

During Daley's stay in the hospital, Kohleffel made a considerable effort to make sure Daley had prepared a valid will before he died. First, supposedly at Daley's request, Kohleffel contacted Daley's family attorney, Mal Schumard, seeking a copy of Daley's Will. Schumard searched his office for the Will, but found nothing. Kohleffel then sought advice from Schumard on how to prepare a Will. According to Schumard's notes, Kohleffel made at least four (4) personal visits to Schumard and five (5) evening and weekend phone calls to him during Daley's hospitalization to discuss the preparation of a Will. Kohleffel denies visiting Schumard at all during this time period.

Even after Schumard had told Kohleffel that he had no will in his possession, Kohleffel again asked Schumard for Daley's Will immediately after Daley's death. Kohleffel then brought the handwritten notes he had made during visits with Daley to seek Schumard's advice on how the notes could be probated. Schumard explained to Kohleffel in great detail that the notes were not a Will,

but Kohleffel persisted. A few weeks later, Kohleffel returned with an affidavit from a "witness" of the hand-written notes and presented it to Schumard. Schumard again explained to Kohleffel that the notes were not a valid will even with the witness' affidavit.

Meantime, in order to begin the administration of Daley's estate, Evans made application to the probate court and was subsequently appointed Administratrix of the Estate of Fred G. Daley, Deceased on April 9, 1984, almost six (6) weeks from the date of Daley's death. Since no will had been uncovered, the probate court declared that Daley had died intestate. In order for Evans to be appointed Administratrix to get on with the administration of the estate, Evans was forced to declare that no lawful will was in existence.

Even so, Evans got permission from the probate court to investigate whether or not Daley had actually executed a will. In addition to Kohleffel's suspicious conduct, Evans was being told by others that Daley did, in fact, have a will. Thus, the probate court granted her permission to prosecute any claim against USA and Kohleffel that arose from the unauthorized entry into Daley's safety deposit box as long as the attorneys were employed on a contingent fee basis.

Evans investigated but no will has ever been found.

Evans sued USA and Kohleffel to continue the estate's early investigations and to recover the monies spent in the investigation because if USA had not allowed Kohleffel into Daley's safety deposit box, no investigation or prosecution would have ever been necessary. Thus,

only for USA's and Kohleffel's wrongful conduct, were any of the damages incurred by Evans or Daley's estate.

USA and Kohleffel were originally sued in Texas state District Court. The Texas Trial Court granted a summary judgment on Defendants' behalf, but the Texas Court of Appeals in San Antonio reversed and remanded the case on December 13, 1989 (App. 24-31).

During the appellate process, the RTC was placed as the receiver for USA, and after exhaustion of her administrative remedies, Evans brought suit in the United States District Court for the Western District of Texas. Evans sued USA for breach of contract, negligence and conspiracy to commit trespass upon the personalty of the deceased and also sued Kohleffel for trespass, negligence and conspiracy to commit trespass as well as intentional conduct entitling Evans to punitive damages. Both of the Defendants moved for summary judgment claiming that Daley did not leave a will and no evidence existed for Evans to conclude that a will did exist and thus, her attempts to locate a will and the resulting expenses were unreasonable and thus, unrecoverable. Kohleffel, in addition to the grounds raised by USA, also argued that Evans was judicially estopped from claiming a will existed and thus, her investigation was unwarranted.

The Trial Court granted Defendants' motions for summary judgment in spite of the fact that fact issues existed concerning the reasonableness of Evans' action, her entitlement to recover damages and the damages suffered by her in her individual capacity. Fact issues also existed which supported Evans' version of the facts and her decision to investigate the existence of the will, the

amount of damages she incurred in such investigation, the reasonableness of her decision and the foreseeability of her damages. The Trial Court made several impermissible findings of fact and weighed the credibility of the evidence submitted. In spite of the fact findings made by the District Court, the Court of Appeals affirmed the summary judgment for the Defendants ". . . [f]or the reasons clearly stated in the District Court's order . . . " (App. 3).

REASONS FOR GRANTING THE WRIT

The issues raised in this Petition relate to the proper application of Rule 56(c) of the Federal Rules of Civil Procedure. Contrary to Rule 56 and this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), the Trial Court weighed the evidence presented by both parties and determined the truth of the matters rather than determining whether genuine issues existed for trial. Because the District Court's opinion is replete with fact findings and opinions concerning the credibility of affidavit testimony, and the well-established summary judgment standard which prohibits such fact findings, this Court should grant this Petition.

I. The Court Of Appeals Erred By Affirming The District Court's Summary Judgment For The Defendants Because The District Court Failed To Follow The Summary Judgment Standard Of Rule 56(c).

At the outset of its discussion of Plaintiff's specific claims, the Trial Court stated that it would consider

whether an alleged will existed and that this "discussion- . . . will enlighten the later discussion about whether it was reasonable to believe that there might be a will and to search for its possible whereabouts" (App. 8). At this point, the Court discussed whether or not a will exists or ever existed. The Court goes on to state that "based on the summary judgment evidence the court would conclude *on its own* that [Daley] never executed a valid will" (emphasis added) (App. 8). In reaching this conclusion, the Court weighed the credibility of the evidence presented.

Specifically, the Court concluded that Edwin Ward's affidavit submitted by Defendants was worthy of belief and more credible since "he lacked any significant personal interest in the outcome of the dispute that might color his testimony" (App. 10). The Court also extrapolates from Mr. Ward's affidavit testimony that it suggests some intent on behalf of Daley to not draft a will because he was not worried about dying (App. 10). The Court also extrapolates from this one affidavit that according to a conversation he had with Daley's aunt (which the Court acknowledged as hearsay), that Daley's aunt was "not of the opinion that [Daley] had drafted a will" (App. 11).

In addition to the weight given to Mr. Ward's affidavit testimony and the improper conclusions drawn from it, the District Court states that Petitioner's affidavit is simply "insufficient to overcome the evidence supporting the conclusion that the deceased died intestate" (App. 11). Such statement is contrary to this Court's summary judgment standard as stated in *Anderson v. Liberty Lobby, Inc.* " . . . [I]t is clear enough from our recent cases that at the summary judgment stage, the Judge's function is not

himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.* at 249. The Court is to determine " . . . whether there is a need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

In this case, the Court imposed a more strict standard upon the Petitioner, that being that the Petitioner was required to present evidence that "overcomes" evidence supporting Defendants' position. The Court also neglected the fact that facts as recited by the Plaintiff which are supported by evidence presented in response to a motion for summary judgment are to be taken as true and "all justifiable inferences are to be drawn in [Plaintiff's] favor." *Id.* at 255. "Credibility determinations, the weight of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or directed verdict." *Id.*

In addition to the inferences drawn from the affidavit of Edwin Ward and the great weight given to his affidavit testimony, the Court also chose to not accept Petitioner's affidavit testimony. Not only did the Court not accept this testimony, but the Court gave its own opinion as to the type of people who die without leaving a will. The Court states "many responsible people are intestate" (App. 11). No evidence was submitted in support of this statement and is contrary to the affidavit testimony submitted by the Petitioner which stated that she knew Daley's overall character. Based on her knowledge of his character and person, it was her opinion that he was more likely than

not to leave a will upon his death. Whether her opinion was valid or not and reasonable for reliance, was for a jury to decide, not the judge.

Next, the Court chose to disregard the affidavits submitted by the Plaintiff in support of her response to Defendants' motions for summary judgment. The Court states that because "neither affiant was cross-examined and neither affidavit gives the Court any significant information about the circumstances under which the statements were made, that they are outweighed by the summary judgment evidence, which tends to show that there was not a will" (App. 12). Both of these affidavits were from persons who had conversations with Daley about his will or had facts on which they based their opinion that a will did exist. These were both persons upon whom Evans relied in making her decision to search for a will and thus, their credibility should not have been an issue for the Court.

Finally, the Court evaluates the sworn testimony of Kohleffel and states that although his testimony is self-serving and "certainly suspect," that it does not "establish that Kohleffel destroyed or hid another will" (App. 12). However, as stated by this Court, the test for determining whether or not a summary judgment is appropriate is not whether or not the Plaintiff is able to establish conclusively the allegations made in his or her complaint, but rather whether or not there are fact issues which should be submitted to a jury for their determination. *Id.* at 252. The Court, on its own, decided that Plaintiff's suspicions of Kohleffel's statements and actions "make little sense" as in the Court's opinion, Kohleffel would not enter the lock box and destroy the alleged will just to

see the estate pass to the deceased's legal heirs (App. 12). Of course, the Court based this conclusion on its determination that Kohleffel knew at the time he entered the lock box that the handwritten notes did not and could not constitute a will (App. 12). The evidence submitted in support of Plaintiff's response to the motions for summary judgment clearly established that fact issues existed concerning the number of times Kohleffel consulted Daley's attorney, when he consulted Daley's attorney and for what reasons he sought such consultations. Thus, to make a conclusion concerning Kohleffel's mental state at the time he entered the lock box, was highly improper and contrary to the summary judgment standard. Yet, the Court continued to make value judgments and imposed its own opinions on the facts presented to it. For example, the Court concluded:

> It makes more sense to assume that [Kohleffel] entered the box hoping to find a validly executed will devising significant assets to Kohleffel's wife. Whatever the most logical explanation of [Kohleffel's] action is however, there is simply no evidence suggesting that Kohleffel destroyed a validly executed will of [Daley] (App. 12).

Finally, the Court concludes, that Daley died intestate, and based the remaining amount of its opinion on this conclusion (App. 12-13).

In addition to the fact findings illustrated above, the Court found that no estate funds were expended in the investigation and prosecution of the claims against Defendants although evidence to the contrary was submitted. Other findings in the Court's opinion which are

indicative of the fact finding role which the Court inappropriately adopted while considering Defendants' motions for summary judgment are as follows:

- USA's "uncontradicted interrogatory answers *indicate* that Kohleffel obtained access to [Daley's] (sic) through an oversight on the part of University Savings" (emphasis added) (App. 13).

- The confusion *was understandable* in light of [USA's] answer (emphasis added) (App. 13).

- " . . . [i]t *seems clear* that the vast majority of [money expended by Evans] represents fees paid to attorneys to prosecute this action and a similar, prior action in state court" (emphasis added) (App. 19).

- "The *Court* is therefore left with the distinct *impression* that Plaintiff has done a lot more prosecuting than investigating" (emphasis added) (App. 19).

- "Although it might have been foreseeable to a person of ordinary intelligence and experience that the conduct of Kohleffel might result in an investigation into the possible existence and whereabouts of a valid will, that is not what happened in this case. . . . Plaintiff chose to fund an expensive legal battle against Defendants. *The Court concludes* that *it was unforeseeable* that someone would try to determine whether someone had executed a valid will by hiring some lawyers on an hourly basis to file and prosecute a tort suit as was done in this case" (emphasis added) (App. 20).

- "Kohleffel, himself, was able to determine that [Daley] had not executed a will by simply asking the deceased's attorney, Mr. Schumard" (App. 20, Note 4).

Considering all of the above findings of fact and opinions stated by the District Court on which it admittedly based its decision, the District Court's opinion and that of the Court of Appeals was not based on the appropriate summary judgment standard. This deviation from a clearly established standard and rule constitutes the type of departure from accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision.

In this case a decedent's safe deposit box in a federally insured financial institution (USA) was allowed to be opened and emptied by an unauthorized individual. That same individual (Kohleffel) then engaged in the suspicious behavior of trying to have some unsigned notes benefiting Kohleffel's family probated as the decedent's will. Between the financial institution's version of the facts and Kohleffel's version, numerous factual conflicts exist. Without the opportunity of careful examination and cross-examination allowed by the trial process, no serious attempt can be made to resolve these conflicts. Absent such a process, and with the elimination of investigative costs as damages, the conclusion in this case is that once the fiduciary responsibility of a financial institution to provide security for a safe deposit box is breached, there are few if any legal remedies because the contents of the box cannot be established with the resulting difficulty in establishing damages.

Whether of not Roseann Evans was entitled to recover the costs of the investigation into the whereabouts of her uncle's will and the suspicious actions of USA and Kohleffel is a fact question to be decided by a jury. A jury should be allowed to hear from the witnesses and judge their credibility on its own. The evidence establishes that Roseann Evans did what she is obligated by state law and what she determined was necessary to protect the interest of Daley's estate. The only reason she had to expend the funds to protect the estate is because of the wrongful conduct of USA and Kohleffel and she should be allowed to present her case to a jury for its consideration.

In sum, the Court of Appeals based its decision on inappropriate grounds as stated by the Trial Court as the analysis conducted by the District Court was inappropriate and contrary to the summary judgment standard set forth in Rule 56(c) and *Anderson v. Liberty Lobby, Inc.* This Court should therefore grant a writ of certiorari to review the judgment of the Court of Appeals.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Date: August 10, 1994

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8913
Summary Calendar

ROSEANN DALEY EVANS, individually and as Administratrix of the Estate of Fred G. Daley, deceased,
Plaintiff-Appellant,

VERSUS

RTC AS RECEIVER FOR UNIVERSITY SAVINGS, and in all other capacities, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas

(SA-92-CV-991)

(Filed May 16, 1994)

Before GARWOOD, SMITH, and DEMOSS, Circuit Judges.

PER CURIAM:*

Roseann Daley Evans, individually and as administratrix of her half-uncle's estate, appeals the district

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's summary judgment for the Resolution Trust Corporation (RTC) and Ted Kohleffel. Finding no error, we affirm.

I.

After the plaintiff's half-uncle Fred Daley died, a Texas probate court ruled Daley died without a will. Notwithstanding the probate court's finding, Evans was suspicious that the defendants, University Savings Association (USA)[1] and Ted Kohleffel, had conspired to destroy a will that her half-uncle had allegedly written. Specifically, according to Evans, USA improperly permitted Kohleffel access to Fred Daley's safe deposit box. Kohleffel found various items but *did not* find a will. He later maintained that, just prior to his death, Daley dictated to him that he intended to leave his property to Kohleffel's wife. Kohleffel then submitted his notes to Daley's attorney for an opinion as to whether they constituted a valid will. Daley's attorney said they did not.

Based on USA's and Kohleffel's conduct, Evans filed suit against the RTC and Kohleffel. She specifically sued USA for breach of contract, negligence, and conspiracy to commit trespass upon her half-uncle's personal property. She sued Kohleffel for *inter alia* trespass, negligence and conspiracy to commit trespass. The defendants moved for summary judgment as to all of Evans's claims. The district court granted the defendants' motions. Evans now appeals.

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[1] USA recently was declared insolvent and the Resolution Trust Corporation (RTC) was appointed its receiver.

II.

We review summary judgment de novo. *Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992). We have conducted a thorough review of the parties' briefs and the record on appeal. For the reasons clearly stated in the district court's order, we are satisfied that the court's summary judgment for the defendants was proper.

The district court's judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROSEANN DALEY EVANS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FRED G. DALEY, DECEASED, Plaintiff, VS. RESOLUTION TRUST CORPORATION, RECEIVER FOR UNIVERSITY SAVINGS ASSOCIATION AND IN ALL OTHER CAPACITIES, and TED KOHLEFFEL, Defendants.	)	CIVIL ACTION NO. SA-92-CA-991 (Filed Dec. 3, 1993)

ORDER GRANTING SUMMARY JUDGMENT

On this day, the Court considered Defendant Resolution Trust Corporations ("RTC's") Motion for Summary Judgment or Alternatively, Motion for Summary Adjudication filed on May 14, 1993, Defendant Kohleffel's Motion for Summary Judgment filed on May 17, 1993, and Plaintiff's response thereto all filed in the above styled and numbered cause. After careful consideration of all the papers and pleadings, the Court is of the opinion that the motions should be granted.

I. INTRODUCTION

This case concerns Plaintiff's effort to recover damages, both as administrator of the estate of her half-uncle, Fred G. Daley, Deceased, and individually, for the expenses that she incurred trying to determine if Deceased had a will. Plaintiff has asserted causes of action against Defendant Resolution Trust Corporation as Receiver for University Savings Association, ("University") for breach of contract, negligence, and conspiracy to commit trespass upon the personality of Deceased. Plaintiff has also alleged causes of action against Defendant Kohleffel for trespass, negligence, conspiracy to commit trespass, and intentional conduct entitling Plaintiff to punitive damages.

Mr. Daley died after two weeks in a hospital on February 29, 1984. One or two days later, Kohleffel obtained access to and opened the safe deposit box of Deceased located at University Savings Association. Kohleffel removed the contents of the box. According to Kohleffel, he turned Deceased's birth certificate and military discharge certificate over to the funeral home and, on March 1, 1984, turned the rest of the documents over to Plaintiff. These documents included some stock certificates, some passport savings books, and a warranty deed to Deceased's property.

During the two weeks Deceased was in the hospital prior to his death, Kohleffel made a considerable effort to obtain a validly executed will from Fred Daley devising a significant portion of Daley's assets to Kohleffel's wife. Kohleffel conferred with Deceased's attorney, Mr. Shumard on more than one occasion during this time. Kohleffel

represented to Shumard that Daley had sent him from the hospital to look for the will. Kohleffel told Shumard that Daley thought that Shumard had drawn up a will for him. Although certain that he had never drafted a will for Daley, Shumard made an extensive search of his office and found no will. Kohleffel also questioned Shumard about the legal requirements of a valid will and eventually produced a document written partially in his own handwriting and partially in the handwriting of Daley. This document purported to devise a portion of Daley's estate to Kohleffel's wife. Upon viewing the document, Shumard informed Kohleffel that it was not a valid will.

Plaintiff was appointed as administrator of Deceased's estate on April 9, 1984 by the Kendall County Court sitting in probate. On that day, Plaintiff swore under oath that Deceased passed away intestate. The Kendall County Court entered a Judgment Declaring Heirship in the matter of Fred G. Daley on November 9, 1985. The judgment also declares that Deceased died intestate.

At some point in time during the probate proceeding, Plaintiff moved for permission to pursue claims against Defendants. The probate court granted Plaintiff permission to enter into a contingent fee contract to prosecute any claim that arose from Kohleffel's entry into Daley's lock box. This order expressly provided that the estate would not be responsible for any costs or expenses of collection unless the claim was collected. When it became apparent to Plaintiff that no law firm would handle this claim on a contingent basis, she hired legal assistance at her own expense on an hourly basis and filed a suit in state district court with essentially the same claims as the

suit at bar. The state district court granted summary judgment for the Defendants and Plaintiff appealed. On December 13, 1989, the Texas Court of Appeals in San Antonio reversed and remanded concluding that "there is a fact issue as to whether [Plaintiff] had a reasonable belief that Kohleffel might have destroyed or secreted a will."

The record does not indicate what transpired upon remand. Apparently, because the RTC had taken over University Savings Association, the Plaintiff filed this suit in federal court on October 22, 1992 in lieu of pursuing the state court action.

II. SUMMARY JUDGMENT STANDARD

The Court must address the standard to be applied in determining whether or not to grant summary judgment. Federal.Rule of Civil Procedure 56(c) provides:

> **Motion and Proceedings [on Summary Judgment].** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is. entitled to a judgment as a matter of law.

Defendant, though movant for summary judgment, will not carry the burden of proof at trial as to the issues the Court now faces.

Under well established case law regarding summary judgment, the movant need only present or designate evidence that negates or disproves "the existence of any essential element of the opposing party's claim." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). The burden on the moving party may be discharged by pointing out to the Court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986). Once movant has made this showing, the non-movant must then respond with a specific factual showing that there is a genuine issue in dispute. *Id.*, 477 U.S. at 324, 106 S.Ct. at 2553; *Sims v. Monumental General Insurance Co.*, 960 F.2d 478, 479 (5th Cir. 1992).

III. DISCUSSION

Before turning to the specific claims made out in Plaintiff's complaint, the Court will consider whether the alleged will existed. Hopefully, discussion of this issue will enlighten the later discussion about whether it was reasonable to believe that there might be a will and to search for its possible whereabouts.

A. The Existence of a will

As a matter of law, Plaintiff is precluded from relitigating the issue of Deceased's intestacy in this Court by the findings of fact contained in the probate court judgment declaring heirship. Even if this were not the case, based on the summary judgment evidence the Court would conclude on its own that Deceased never executed a valid will.

The Kendall County Court entered a Judgment Declaring Heirship on November 6, 1985. Among the findings that it recorded in that judgment, the court found that "the evidence presented and admitted fully and satisfactorily proves . . . the Decedent died intestate. . . . " In Texas, the judgment entered in an heirship proceeding is a final judgment. Tex. Prob. Code. Ann. § 55 (West 1980). Plaintiff, as administrator and as an heir with notice of the proceeding, not only had the opportunity to contest this issue in the probate court, but had a duty to do so if she had reason to believe that a will existed. She is bound by the probate court's judgment and its findings. Plaintiff did not contest the heirship judgment in any way and is now precluded from relitigating any issues determined in that proceeding here.

Even if it were free to make its own finding, the Court would conclude that there was no will. Deceased's attorney Mr. Shumard, who knew Deceased for at least ten years, stated in his deposition that he was positive that he did not draft a will for Deceased and that he never discussed the preparation of a will with Deceased. Shumard deposition at p.4. Nevertheless, Mr. Shumard's employees conducted a thorough search of the office when it was suggested to Mr. Shumard by Defendant Kohleffel that Deceased thought that Mr. Shumard might have drafted a will for him. *Id.* The office search turned up no will.

Mr. Shumard's legal bill indicates that ten hours were spent conferring with "attorneys, relatives, friends,

hunters, neighbors, organizations, employees" and checking the files and reports from other attorneys in an effort to locate a will. This search was also unsuccessful.

Defendant University also submitted portions of the deposition of Decedent's neighbor Edwin Ward with its summary judgment motion.[1] Mr. Ward, unlike most of the other individuals involved in this dispute, lacked any significant personal interest in the outcome of the dispute that might color his testimony. He visited Deceased just prior to his death simply because he was a neighbor and a friend of Deceased's family. According to Mr. Ward, he and Deceased were having a conversation on various topics when Deceased unexpectedly said to him, "I don't know what would have happened to me – to my place if I would have died . . . I don't even have a will." Ward deposition at p.9.

Mr. Ward further testified that during that same conversation, two days before his death, Deceased said that he felt fine and that he was expecting to go home the next day. *Id.* This testimony suggests why Deceased failed to draft a will even though he was worried about the disposition of his property after his death.

Mr. Ward testified that, a day or two after Deceased's funeral, he visited Deceased's aunt Mrs. Blakely. Mr. Ward told Mrs. Blakely that he and Deceased had spoken

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[1] Although Mr. Ward's deposition contains hearsay, Plaintiff filed no objection and has therefore waived any objection to the Court's consideration of the deposition. Moreover, Deceased's statements to Mr. Ward fall within the hearsay exception of Fed. R. Ev. 803(3).

just two days before the death and that during this conversation, Deceased had mentioned that he had no will. According to Mr. Ward, Mrs. Blakely responded to this news by saying, "well, I guess Fred thought he was going to live forever." Apparently, Deceased's aunt, who was in frequent contact with Deceased, was not of the opinion that Deceased had drafted a will. In addition, Deceased told Mr. Ward that it was his desire to see that the property not pass to his family members because he believed that they would parcel up the land and sell it.

In her own deposition, Plaintiff admits that no one ever saw a will and that her belief that one existed was founded upon 1) her knowledge of Deceased's overall character as a responsible person, 2) statements from other individuals who indicated that Deceased had made a will, and 3) Defendant's Kohleffel's attempt to have a non-testamentary document accepted as a valid will. The Court finds these three grounds insufficient to overcome the evidence supporting the conclusion that Deceased died intestate.

While no one disputes that Deceased was a responsible person, many responsible people are intestate. Plaintiff's opinion of Deceased's character is of little probative value when one is trying to determine if Deceased executed a will.

The statements of other individuals referred to by Plaintiff consist of two one page affidavits attached to Plaintiff's response to the summary judgment motions. The first affidavit, of Imogene Callan, declares that Deceased told her on May 14, 1983 that he had a typewritten will. The second affidavit, of Willadene Garcia,

states that sometime between 1981 and 1983, Deceased mentioned having "his wishes on paper with Judge Shumard." Neither affiant was cross-examined and neither affidavit gives the Court any significant information about the circumstances under which these statements were made. These affidavits are outweighed by the summary judgment evidence tending to show that there was no will.

Finally, the actions of Defendant Kohleffel in entering the lock box and trying to pawn off the hand written document as Deceased's will, while self-serving and certainly suspect, do not establish that Kohleffel destroyed or hid another will. Defendant Kohleffel did not enter the lock box until after the Deceased had passed away. By that time however, Kohleffel had already been informed by Mr. Shumard that the hand written document was not a properly executed will. Under these circumstances, it would make little sense for Kohleffel, who was not an heir, to enter the lock box and destroy the alleged will just to see the estate pass to Deceased's legal heirs. It makes more sense to assume that he entered the box hoping to find a validly executed will devising significant assets to Kohleffel's wife. Whatever the most logical explanation of Defendant's action is however, there is simply no evidence suggesting that Kohleffel destroyed a validly executed will of Deceased.

Although at one time or another, both Plaintiff and Defendant have tried to maintain that Deceased executed a will, neither party has yet to produce one. The Court concludes from all of the above that Deceased died intestate and that this Court is, in any event, bound by the judgment and findings of fact of the probate court. With

this conclusion in mind, the Court now turns to the specific claims of Plaintiff's complaint.

B. **Claims Made on Behalf of the Estate**

The claims on behalf of the estate all fail for lack of damages because, as the Court has just concluded, there was no will and because no estate funds were expended searching for a will. In her own deposition, Plaintiff admits that no estate funds were expended in the prosecution of the claims against Defendants. Evans deposition at p. 83. In fact, Plaintiff was expressly prohibited from using any estate assets to pursue this matter under an order of the probate court. The absence of damages is fatal to the causes of action made on behalf of the estate.

C. **Claims Made on Behalf of Plaintiff Individually**

1. Claim for Joint Conduct of Kohleffel and University Savings

The summary judgment evidence contains no evidence creating any genuine issue on Plaintiff's allegations that the defendants acted in concert. Defendant University Savings' uncontradicted interrogatory answers indicate that Kohleffel obtained access to Deceased's through an oversight on the part of University Savings. The confusion was understandable in light of Universities' answer which claims that Kohleffel had his own safe deposit box and that University thought that Kohleffel was requesting access to his own box. University also submitted uncontroverted evidence that they did not

know of Deceased's death at the time of Kohleffel's access.

In Texas, one of the essential elements of a cause of action for civil conspiracy is a meeting of the minds of the actors on the object or course of action to be followed. *Massey v. Armco Steel Co.*, 652 S.W.2d 932 (Tex. 1983). Absent any evidence of collusion between the defendants, summary judgment will be granted for Defendants.

2. Contract Claims Against University Savings

Although University may have breached a contract or acted negligently with respect to Deceased and Deceased's estate, they did not violate any duty with respect to Plaintiff in her individual capacity.

Under Texas law, only the actual parties to a contract and the intended third-party beneficiaries can claim the benefit of the contract. *RTC v. Kemp*, 951 F.2d 657, 662 (5th Cir. 1992). It is undisputed that Plaintiff was not a party to the safe deposit box contract of Deceased. Therefore, to recover on a contract claim, Plaintiff must establish that she was an intended beneficiary of the contract. A party claiming third party beneficiary status must prove **from the terms of the contract** that the parties to the contract intended to benefit the third party at the time they entered into the contract. *Id.* (emphasis in original). Courts presume that the parties contracted for themselves only unless it clearly appears that the parties intended to benefit the third party claimant. *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503-04 (Tex. 1975). Plaintiff

has failed to establish any terms of the safe deposit box contract which indicate the parties' clear intention to benefit her and therefore the Court grants summary judgment for Defendant on the contract claims.

3. Negligence Claims Against University Savings

Plaintiff must establish the existence and violation of a duty that Defendant owed her to recover in tort. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). While a party to a contract is under a duty to perform the contract with care, skill, and faithfulness and failure to do so is a tort in Texas, *Montgomery Ward & Co. v. Scharrenbeck*, 145 Tex. 153, 204 S.W.2d 508 (Tex. 1947), the Court has already held that Plaintiff cannot recover under the contract. Therefore, whether or not Defendant's conduct rose to the level of a tort for failure to exercise the requisite care, skill, and faithfulness, Defendant's duty under the contract was not owed to this Plaintiff and summary judgment is appropriate.

4. Trespass Claim against Kohleffel

Trespass to personalty consists of an unlawful interference with or injury to possession. *Malouf v. Dallas Athletic Country Club*, 837 S.W.2d 674, 676 (Tex. App. – Dallas 1992, writ dis'd w.o.j.); *Mountain States Tel. & Tel. Co. v. Vowell Constr. Co.*, 341 S.W.2d 148, 150 (Tex. 1960). Actual or constructive possession is necessary to maintain an action for trespass to personalty. 87 C.J.S. *Trespass* § 19 (1954).

It is uncontested that Plaintiff, in her individual capacity, had no actual or constructive possession of any of the items in the safe deposit box. Therefore, even if the Court were to assume that there was a will in the box, Plaintiff's trespass cause of action fails for lack of the requisite possession.

5. Negligence Claims against Kohleffel

In her final claim against Defendant Kohleffel, Plaintiff asserts that Kohleffel negligently damaged her by entering the lock box and by suggesting that Deceased had executed a will leaving significant assets to Kohleffel and his wife. According to Plaintiff, she was harmed monetarily by Kohleffel's conduct because she was forced to conduct a search for a valid will that might have been executed by Deceased.[2]

Under Texas law, actionable negligence consists of a duty on the part of one party to another, a breach of that duty, and injury proximately caused by the breach. *FDIC v. Ernst & Young*, 967 F.2d 166, 170 (5th Cir. 1992). In order to survive summary judgment on her negligence claim, Plaintiff must demonstrate that a genuine issue of a material fact exists with respect to each element of the cause of action.

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[2] Although Plaintiff's complaint mentions mental anguish, Plaintiff has not suggested in her summary judgment response that she is still pursuing mental anguish damages. Even if she were, Plaintiff has put on no summary judgment evidence to support an award for mental anguish damages.

On the first element, existence of a legal duty, the Court is unable to say that Defendant Kohleffel owed no duty to Plaintiff. Everyone has a duty to exercise reasonable care to avoid foreseeable injury to others. *Hayes v. United States*, 899 F.2d 438, 444 (5th Cir. 1990). The Court views the question of whether the particular damages alleged by Plaintiff were a foreseeable consequence of Kohleffel's conduct as a proximate causation issue and will reserve discussion of this question for later.

The Court is also unable to say that, as a matter of law, Kohleffel did not breach his duty of reasonable care when he entered the lock box of Plaintiff's deceased uncle, removed the contents of the box, and then tried to convince Plaintiff that list written by Kohleffel and Deceased was Deceased's valid will. Defendant Kohleffel maintains that the list represented the last wishes of Decease and that he was simply trying to carry out those wishes. Plaintiff's characterization of the whole affair is substantially different. In her view, Kohleffel's conduct was self interested and deceitful and reasonably led her to believe that Kohleffel might have destroyed the real will and that a search was therefore necessary.

The Court feels that questions of whether a legal duty has been breached by certain conduct are particularly inappropriate for summary judgment. The Court cannot effectively assess the credibility of the parties by inspecting summary judgment documents except in rare cases not present in this case. Summary judgment on this issue therefore would be improper.

The Court then is left with what it sees as the essential question to be decided on this summary judgment

motion. Were the expenses incurred by Plaintiff proximately caused by Defendant Kohleffel's conduct? To answer this question of course, one must define proximate causation. The Texas Supreme Court has said:

> [p]roximate cause includes two essential elements: (1) foreseeability, and (2) cause in fact. Both elements must be present and may be established by direct or circumstantial evidence. Proximate cause cannot be established by mere guess or conjecture, but rather must be proved by evidence of probative force. Foreseeability is satisfied by showing that the actor, as a person of ordinary intelligence, should have anticipated the danger to others by his negligent act. Cause in fact means that the act or omission was a substantial factor in bringing about the injury and without which no harm would have occurred. *McClure v. Allied Stores of Texas*, 698 S.W.2d 901, 903 (citations omitted).

The Court finds that cause in fact is established by the summary judgment evidence. Had Kohleffel not entered the lock box and not tried to have his list recognized as Deceased's will, there would have been no dispute to resolve and no need to search for a will. In reaching this conclusion of course, the Court views the summary judgment evidence in the light most favorable to Plaintiff as the non-moving party.

Whether the alleged damages were a foreseeable consequence of Kohleffel's conduct is a closer question. Before addressing it directly, the Court first makes some observations about the damages. Plaintiff alleges that she has spent in excess of $103,000.00 in the investigation and prosecution of the matter described in the petition. Evans

Affidavit at 4. The Court is unable to find any documents that detail precisely how this figure was determined but it seems clear that the vast majority of it represents fees paid to attorneys to prosecute this action and a similar prior action in state court. Plaintiff hired only one investigator and acknowledges that "we have not been able to . . . do as much actual investigation." Evans deposition at 55.

The Court is therefore left with the distinct impression that Plaintiff has done a lot more prosecuting than investigating. In other words, the damages which Plaintiff seeks in this action consist primarily of the attorneys fees she paid to prosecute this action. If she had not filed any lawsuits, Plaintiff would have suffered no damages.

These considerations affect the Court's assessment of the foreseeability of the damages. Foreseeability requires that the injury complained of be of such a general character as might reasonably have been anticipated from the defendant's conduct.[3] *Bykowicz v. Pulte Home Corp.*, 950 F.2d 1046, 1054 (5th Cir. 1992). The damages alleged here do not meet this requirement.

Although it might have been foreseeable to a person of ordinary intelligence and experience that the conduct of Kohleffel might result in an investigation into the possible existence and whereabouts of a valid will, that is

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[3] As Texas courts have recognized, even the perpetrator of a willful, wrongful, or criminal is not responsible for injuries that could not have been reasonably anticipated as a probable result of his act. *Sitton v. American Title Co. of Dallas*, 396 S.W.2d 899, 904 (Tex. Civ. App. – Dallas 1965, writ ref'd n.r.e), *cert. denied*, 385 U.S. 975.

not what happened in this case. Instead of simply asking all those who might have known if Deceased executed a will[4], Plaintiff chose to fund an expensive legal battle against Defendants. The Court concludes that it was unforeseeable that someone would try to determine whether someone had executed a valid will by hiring some lawyers on an hourly basis to file and prosecute a tort suit as was done in this case. The injuries were not proximately caused by the conduct because the injuries complained of by Plaintiff were not a foreseeable consequence of Defendant Kohleffel's conduct. Having failed to survive summary judgment on the proximate causation issue, Plaintiff cannot withstand Defendant's summary judgment motion on her negligence claim. The Court has therefore disposed of all of Plaintiff's claims and will enter summary judgment for Defendants.[5] Accordingly,

IT IS HEREBY ORDERED that Defendant Resolution Trust Company's Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that Defendant Ted Kohleffel's Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that all pending motions remaining in this case are DENIED;

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[4] Kohleffel himself was able to determine that Deceased had not executed a will by simply asking Deceased's attorney, Mr. Shumard.

[5] Although Plaintiff's complaint contains a prayer for punitive damages, it is well settled in Texas that punitive or exemplary damages are unavailable absent actual damages. *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281 (5th Cir. 1991).

SIGNED and ENTERED on this 3rd day of December 1993.

/s/ Edward C. Prado
EDWARD C. PRADO
United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROSEANN DALEY EVANS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FRED G. DALEY, DECEASED,	)	
Plaintiff,	)	CIVIL ACTION NO. SA-92-CA-991
VS.	)	
RESOLUTION TRUST CORPORATION, RECEIVER FOR UNIVERSITY SAVINGS ASSOCIATION AND IN ALL OTHER CAPACITIES, and TED KOHLEFFEL,	)	(Filed Dec. 3, 1993)
Defendants.	)	

JUDGMENT

On this day, the Court considered the judgment to be entered in the above styled and numbered cause.

Pursuant to an order of even date,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Defendant Resolution Trust Company's Motion for Summary Judgment is GRANTED such that Plaintiff take nothing;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendant Ted Kohleffel's Motion for Summary Judgment is GRANTED such that Plaintiff take nothing;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the parties shall bear their own respective costs.

SIGNED and ENTERED on this 3rd day of December 1993.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

Court of Appeals
Fourth Supreme Judicial District of Texas
San Antonio
* * * (Seal) * * *

OPINION

Appeal No. 04-88-00516-CV

Roseann Daley EVANS, Individually and as Administratrix of the Estate of Fred G. DALEY, Deceased, Appellant

v.

UNIVERSITY SAVINGS & LOAN OF BOERNE, TEXAS and Ted KOHLEFFEL, Appellees

Appeal from the 216th District Court of Kendall County
Trial Court No. 4,972
Honorable Fred Biery, Judge Presiding

Opinion by: Blair Reeves, Justice

Sitting: Blair Reeves, Justice
David Peeples, Justice
Ron Carr, Justice

Delivered and filed: December 13, 1989

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

This is an appeal from a summary judgment. The trial court found that appellant, Roseann Daley Evans, Individually and as Administratrix of the Estate of Fred G. Daley, had not as a matter of law, been damaged by the wrongful entry of Ted Kohleffel, appellee, in a lockbox

leased to the decedent by appellee, University Savings & Loan Association. We reverse the judgment of the trial court and remand the case for a new trial.

Shortly after Daley's death, his friend Ted Kohleffel, without authority, was permitted by an employee of University Savings to open and remove the contents of the lockbox. University Savings explained the wrongful entry in an answer to interrogatories as follows:

> On March 1, 1986, our employees were unaware of the death of Mr. Fred G. Daley. Mr. Ted Kohleffel entered the Branch and asked to enter his safety deposit box. Mr. Kohleffel had box No. 290292. However, he gave our employee, Melissa Dunn, the key to box No. 33, which was issued to Fred C. Daley. Kohleffel testified in his deposition that he had gone to Daley's premises on the day of the funeral and took some papers belonging to the estate of Daley.

Kohleffel and his wife, Dada, were close friends of Daley. They had been neighbors for years; the Kohleffels purchased a piece of land contiguous to Daley in 1978.

Approximately two and one-half weeks prior to Daley's death, he was hospitalized. While in the hospital, Kohleffel visited him once or twice every day. According to Kohleffel, at the request of Daley, he made a list of some of the property Daley owned, so that Daley's attorney might draft a will. Most of the list was in Kohleffel's handwriting. After Daley's death, Kohleffel took the list to Mal Shumard, Daley's attorney, to see if the list was testamentary in nature. When he was informed that it

was not a testamentary instrument, Kohleffel told Shumard that the list represented the last wishes of Daley, and ought to be carried out.

Evans, an heir of the decedent, was appointed Administratrix of Daley's estate. She filed a motion in the probate court for authorization to institute proceedings against University Savings and Kohleffel. The court granted her permission to enter a contingent fee contract with counsel to prosecute any claim against University Savings and Kohleffel that arose from Kohleffel's entry into Daley's lockbox located at University Savings. The order also provided that the estate would not be responsible for any costs or expenses of collection unless the claim was collected.

Evans then filed this suit. As to University Savings, she alleges three causes of action: breach of contract, violation of Section 17.46(b)(5) of the Deceptive Trade Practice Act, and negligence. As to Kohleffel, she alleges a trespass upon the property of Daley due to the unauthorized entry into the safety deposit box.

Our Supreme Court in *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 548-49 (Tex. 1985) set out the standard for reviewing a summary judgment:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
>
> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in it's favor.

Although University Savings and Kohleffel do not deny the unauthorized entry into the lockbox, they assert it has been conclusively established that Daley did not leave a will. Consequently, as a matter of law, neither Evans nor the estate suffered any damage as a result of the entry in the lockbox.

As to Evans personally, University Savings and Kohleffel contend that Evans cannot recover the expenses she advanced in searching for will because she had, prior to creating these expenses, denied the existence of a will. In taking her oath as administratrix, she swore that Daley died "without leaving any lawful will, so far as I know and believe." Therefore, they reason, Evans is judicially estopped to deny that Daley died intestate. *Clear Lake City Water Authority v. Winograd,* 695 S.W.2d 632 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.). *See also Van Deusen v. Connecticut General Life Ins. Co.,* 514 S.W.2d 951, 956 (Tex. Civ. App. – Fort Worth 1974, no writ). But Evans' alleged damages are not predicated upon the testacy of Daley, but rather upon the effort and expense expended to ascertain if Kohleffel had secreted or destroyed Daley's will.

In her affidavit responding to University and Kohleffel's motion for summary judgment Evans stated:

> These two investigations were made necessary by the following: 1. Statements and actions of Ted Kohleffel before and after the opening of the safety deposit box, including but not limited to the following: a. His removal of papers from

> Fred Daley's house; b. his emptying of the safety deposit box without a witness present; and c. his attempt to have accepted as a will an unsigned paper largely in Kohleffel's own handwriting and largely benefiting Dada Kohleffel (his wife); 2. Statements by several people that Fred Daley had told them he had a will; 3. The personal desire of my self to attempt to insure that proper distribution be made of an estate put together by the effort of my grandmother, grandfather, father and half uncle; and 4. my need to insure that the estate be properly distributed and that the estate be protected from any possible future claims that the existence or nonexistence of a will was not carefully investigated.

Obviously, some of the occurrences took place prior to the filing of the oath of administration and some after that event. Upon taking the oath of administration, the administrator is obligated to take possession of all personal property, record books, title papers, and other business records of the estate. TEX. PROB. CODE ANN. § 232. We conclude that there is a fact issue as to whether Evans had a reasonable belief that Kohleffel might have destroyed or secreted a will in his effort to carry out the alleged wishes of Daley, and Daley's estate and Evans would be entitled to damages sustained as a result thereof.

University Savings and Kohleffel further argue that the estate could not suffer damages, since the order authorizing Evans to prosecute a claim against them is contingent on recovery, i.e., the estate is not responsible for costs unless Evans prevailed in finding a will.

The action brought by the estate of Daley and Evans against University Savings alleged University Savings breached its contract with Daley, was negligent in allowing the unauthorized entry into the lockbox, and violated the Deceptive Trade Practices Act.

University Savings contends any DTPA action that Daley might urge as a result of the lease of the lockbox did not survive his death. Evans counters with the contention that the violation occurred after Daley's death, and thus the cause of action passed to his heirs. Upon Daley's death, his property immediately vested in his beneficiaries under his will or his heirs at law. *Parr v. White*, 543 S.W.2d 445, 448 (Tex. Civ. App. – Corpus Christi 1976, writ ref'd n.r.e.); *Zahn v. National Bank of Commerce of Dallas*, 328 S.W.2d 783, 788 (Tex. Civ. App. – Dallas 1959, writ ref'd n.r.e.).

We agree with University Savings. The heirs are not "consumers" as defined in the Deceptive Trade Practices Act as defined in § 17.45( ), which provides: "[A]n individual partnership, corporation, or government entity who seeks or acquires by purchase or lease, any goods or services." *First National Bank of Kerrville v. Hackworth*, 673 S.W.2d 218, 221 (Tex. App. – San Antonio 1984, no writ); *March v. Thiery*, 729 S.W.2d 889, 893 (Tex. App. – Corpus Christi 1987, no writ).

Both University Savings and Kohleffel defend the summary judgment as to the breach of contract, negligence, and trespass causes of action on the theory that, as a matter of law, neither the estate nor Evans has been damaged. We disagree. If the facts warrant it, certainly Evans is entitled to recover the expenses caused in her

search for a will. It is presumed that a trespass is necessarily attended with some damage. *Heiligmann v. Rose,* 16 S.W. 931 (Tex. 1891). For the breach of contract and admittedly negligent acts of University Savings and the alleged overt acts of Kohleffel, damages must be presumed albeit nominal. *Atomic Fuel Extraction Corp. v. Estate of Slick,* 386 S.W.2d 180 (Tex. Civ. App. – San Antonio 1964), *writ ref'd n.r.e.,* 403 S.W.2d 784 (Tex. 1965); *Dalton v. Waggoner,* 30 S.W.2d 665 (Tex. Civ. App. – Austin 1930, writ dism'd).

The judgment of the trial court denying the DTPA action is affirmed. Judgment as to the breach of contract, negligence and trespass causes of action are reversed and remanded for trial on their merits.

BLAIR REEVES,
Justice

DO NOT PUBLISH.

Court of Appeals
Fourth Supreme Judicial District of Texas
San Antonio
* * * (Seal) * * *

JUDGMENT

Appeal No. 04-88-00516-CV

Roseann Daley EVANS, Individually and as Administratrix of the Estate of Fred G. DALEY, Deceased, Appellant

v.

UNIVERSITY SAVING & LOAN OF BOERNE, TEXAS, Appellee

Appeal from the 216th District Court of Kendall County
Trial Court No. 4,972
Honorable Fred Biery, Judge Presiding

JUDGMENT

After hearing this cause and examining the record, the Court finds that the court below committed reversible error. It is therefore ORDERED that the judgment be AFFIRMED IN PART and REVERSED IN PART and the cause be REMANDED IN PART.

It is further ORDERED that Appellant, ROSEANN DALEY EVANS, Individually and as Administratrix of the Estate of FRED G. DALEY, DECEASED, pay one-half of the costs of appeal, and the cash deposited with the District Clerk in lieu of cost bond be used for and subjected to such costs, and Appellee, pay one-half of the costs of appeal and this decision be certified to the trial court.

Entered this 13th day of December, 1989.